

FILED JANUARY 7, 2013

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 11-J-18031-RAP
)	
DOUGLAS EVAN MACKENZIE,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 212953,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

On October 12, 2011, respondent Douglas Evan Mackenzie (respondent) was ordered by the United States Patent and Trademark Office (USPTO) to be disciplined upon findings that he had committed professional misconduct in that jurisdiction. As a result, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding on December 12, 2011. (Bus. & Prof. Code, § 6049.1; Rules Proc. of State Bar, rules 5.350-5.354.)

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent's culpability in the USPTO proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of respondent's misconduct in the USPTO; and (3) whether the USPTO proceeding lacked fundamental constitutional protection. (Section 6049.1, subdivision (b).)

Respondent bears the burden of establishing that the conduct for which he was disciplined by the USPTO would not warrant the imposition of discipline in California and/or

that the USPTO proceedings lacked fundamental constitutional protection. Unless respondent establishes one or both of these, the record of discipline in the USPTO proceeding is conclusive evidence of respondent's culpability of misconduct in California. (Section 6049.1, subdivisions (a) & (b).)

Respondent failed to participate either in person or through counsel, and his default was entered. The State Bar filed a petition for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.¹ Rule 5.85 provides the procedure to follow when an attorney fails to participate in a disciplinary proceeding after receiving adequate notice and opportunity. The rule provides that if an attorney's default is entered for failing to respond to the notice of disciplinary charges (NDC), and the attorney fails to have the default set aside or vacated within 180 days, the State Bar will file a petition requesting the court to recommend the attorney's disbarment.²

In the instant case, the court concludes that the requirements of rule 5.85 have been satisfied, and therefore, grants the petition and recommends that respondent be disbarred from the practice of law.

FINDINGS AND CONCLUSIONS

Respondent was admitted to practice law in this state on May 31, 2001, and has been a member since then.

Procedural Requirements Have Been Satisfied

On December 12, 2011, the State Bar properly filed and served an NDC on respondent by certified mail, return receipt requested, at his membership records address. The NDC notified respondent that his failure to participate in the proceeding would result in a disbarment

¹ Unless otherwise indicated, all references to rules are to this source.

² If the court determines that any due process requirements are not satisfied, including adequate notice to the attorney, it must deny the petition for disbarment and take other appropriate action to ensure that the matter is promptly resolved. (Rule 5.85(E)(2).)

recommendation. (Rule 5.41.) The United States Postal Service did not return the NDC as undeliverable or for any other reason. The State Bar also did not receive the return receipt card.

In addition, respondent had actual notice of this proceeding. On January 9, 2012, the State Bar called the telephone number listed in respondent's official membership records and left a message on the voicemail. In its message, the State Bar advised respondent that he missed the initial status conference and that his response to the NDC was overdue. The State Bar also informed respondent that it planned to file a default motion and initiate disbarment proceedings.

On January 9, 2012, the State Bar also sent respondent an email at the address listed in his official membership records.³ In the email, the State Bar reiterated the information provided to respondent in the aforementioned voicemail. That same day, the State Bar received a reply email from respondent's email address stating: "I am not a member of the State Bar and have no intention of ever again becoming a member. Proceed as you will with your disciplinary action."

Respondent failed to file a response to the NDC. On January 23, 2012, the State Bar filed and properly served a motion for entry of respondent's default. The motion complied with all the requirements for a default, including a supporting declaration of reasonable diligence by the State Bar deputy trial counsel declaring the additional steps taken to provide notice to respondent. (Rule 5.80.) The motion also notified respondent that if he did not timely move to set aside his default, the court would recommend his disbarment. Respondent did not file a response to the motion, and his default was entered on February 8, 2012. The order entering the default was served on respondent at his membership records address by certified mail, return receipt requested. The court also ordered respondent's involuntary inactive enrollment as a member of the State Bar under Business and Professions Code section 6007, subdivision (e),

³ Effective February 1, 2010, all attorneys are required to maintain a current email address to facilitate communication with the State Bar. (Cal. Rules of Court, rule 9.7(a)(2).)

effective three days after service of the order, and he has remained inactively enrolled since that time.

Respondent also did not seek to have his default set aside or vacated. (Rule 5.83(C)(1) [attorney has 180 days to file motion to set aside default].) On October 10, 2012, the State Bar filed the petition for disbarment. As required by rule 5.85(A), the State Bar reported in the petition that: (1) it has had no contact with respondent since the default was entered; (2) respondent has no other disciplinary matters pending; (3) respondent has no prior record of discipline; and (4) the Client Security Fund has not made payments resulting from respondent's conduct. Respondent did not respond to the petition for disbarment or move to set aside or vacate the default. The case was submitted for decision on November 7, 2012.

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of respondent's default, the factual allegations in the NDC are deemed admitted and no further proof is required to establish the truth of such facts. (Rule 5.82.) Section 6049.1(a) provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction shall be conclusive evidence that, subject to limited exceptions, the member is culpable of professional conduct in this state.

The court finds, as a matter of law, that respondent's culpability in the USPTO proceeding would warrant the imposition of discipline in California under the laws or rules applicable in this State at the time of respondent's misconduct in the USPTO proceeding, as follows.

Rules of Professional Conduct, Rule 1-300(B) [Unauthorized Practice of Law in Another Jurisdiction]

By continuing to hold himself out as authorized to represent clients in trademark matters before the USPTO while not entitled to practice law by the State Bar of California in violation of

USPTO rule 37 C.F.R. §10.31(d), respondent held himself out as entitled to practice law in a jurisdiction where doing so was a violation of the regulations of the profession in that jurisdiction in willful violation of Rules of Professional Conduct, rule 1-300(B).

Rules of Professional Conduct, Rule 3-700(B)(2) [Mandatory Withdrawal]

By failing to timely withdraw as the attorney of record in his client's pending trademark matter after his client brought suit against respondent, and by waiting two years to file a request for withdrawal in his client's trademark matter in violation of 37 C.F.R. §10.40(b)(4), respondent failed to withdraw from employment when respondent knew or should have known that continued employment would result in violation of the Rules of Professional Conduct or of the State Bar Act in willful violation of Rules of Professional Conduct, rule 3-700(B)(2).

Rules of Professional Conduct, Rule 3-310(B)(4) [Conflict – Disclosure]

By accepting employment without making full disclosure to his client that respondent's professional judgment on behalf of the client will be or reasonably may be affected by respondent's own financial interest in violation of 37 C.F.R. §10.62(a), respondent accepted or continued representation of a client without providing written disclosure to the client that respondent has or had a professional interest in the subject matter of the representation in willful violation of Rules of Professional Conduct, rule 3-310(B)(4).

Rules of Professional Conduct, Rule 3-310(C)(3) [Conflict – Adverse Interests]

By accepting an employment referral where respondent's independent professional judgment on behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment in violation of 37 C.F.R. §10.66(a), respondent represented two parties with adverse interests in separate matters, without the informed written consent of each client, in willful violation of Rules of Professional Conduct, rule 3-310(C)(3).

Rules of Professional Conduct, Rule 3-310(C)(1) [Conflict – Potential]

By representing two potentially adverse parties without first obtaining the written informed consent of each client and making full disclosure of the possible effect of such representation on respondent's independent professional judgment on behalf of each in violation of 37 C.F.R. §10.66(b), respondent accepted representation of more than one client in a matter in which the interests of the clients potentially conflicted without the informed written consent of each client, in willful violation of Rules of Professional Conduct, rule 3-310(C)(1).

Rules of Professional Conduct, Rule 3-310(F) [Accepting Fees from a Non-Client]

By accepting compensation from a third party for legal services for the benefit of his client without making full disclosure of the compensation arrangement to his client in violation of 37 C.F.R. §10.68(a)(1), respondent accepted compensation for representing a client from a third party without obtaining the client's informed written consent, in willful violation of Rules of Professional Conduct, rule 3-310(F).

Disbarment is Mandated under the Rules of Procedure

Based on the above, the court concludes that the requirements of rule 5.85(E) have been satisfied, and respondent's disbarment must be recommended. In particular:

- (1) the NDC was properly served on respondent under rule 5.25;
- (2) respondent had actual notice of the proceedings prior to the entry of his default, as he was properly served with a copy of the NDC; received a voicemail reminder at his official membership records telephone number; received an email notification from the State Bar; and advised the State Bar, via email, that he did not intend to participate in the disciplinary proceedings;
- (3) the default was properly entered under rule 5.80; and

(4) the factual allegations in the NDC deemed admitted by the entry of the default support a finding that respondent violated a statute, rule, or court order that would warrant the imposition of discipline.

Despite actual notice and opportunity, respondent failed to participate in this disciplinary proceeding. As set forth in the Rules of Procedure of the State Bar, the court must recommend his disbarment.

RECOMMENDATIONS

Disbarment

The court recommends that respondent Douglas Evan Mackenzie be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

The court also recommends that respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that Douglas Evan Mackenzie, State Bar number 212953, be involuntarily enrolled

as an inactive member of the State Bar of California, effective three calendar days after the service of this decision and order. (Rule 5.111(D).)

Dated: January 3, 2013

RICHARD A. PLATEL
Judge of the State Bar Court